

No. 89-885

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

AIR-SEA FORWARDERS, INC.,  
a California corporation,  
*Petitioner,*

vs.

AIR ASIA COMPANY, LTD., a limited  
corporation of the Republic of China;  
E-SYSTEMS, INC., a Delaware corporation,  
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI  
FROM THE ORDER AND AMENDED OPINION  
OF THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**PETITIONER'S REPLY BRIEF**

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PETITIONER'S REPLY BRIEF

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I.

INTRODUCTION

The Supreme Court should grant ASF's Petition for Writ of Certiorari because of the important constitutional principle involved and because the Ninth Circuit's decision is erroneous and at odds with the decisions of other circuits on the same issue. The unmeritorious arguments raised by Respondents do not detract from the fact that ASF was in effect denied its right to a trial by jury in violation of the Seventh Amendment.

## II.

### RESPONDENTS HAVE CITED NO AUTHORITY PERMITTING A SUBSTITUTION OF JUDGMENT BY A TRIAL JUDGE WHEN CREDIBILITY FACTORS PREDOMINATE

In its Petition, ASF cited a line of cases beginning with *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960), *cert. denied*, 364 U.S. 835 (1960), for the proposition that the trial judge should not order a new trial because of a disagreement with the jury's credibility choices in a case that hinges on credibility. As the Court stated in *Lind*:

The jury's main function was to determine the veracity of the witnesses: *i.e.*, what testimony should be believed. If Lind's testimony and that of Mrs. Kennan, Kaufman's secretary, was deemed credible, Lind presented a convincing, indeed an overwhelming case. We must conclude that the jury did believe this testimony and that the court below substituted its judgment for that of the jury on this issue and thereby abused its legal discretion.

*Lind v. Schenley Industries, Inc.*, *supra*, 278 F.2d at 91.

Respondents have cited no authority that permits a trial judge to wholesale reject the jury's credibility choices in ordering a new trial. Instead, Respondents' argument dramatically demonstrates just how much the case hinged on credibility.

Respondents' version of the facts is nothing more than an inverted mirror image of the truth. Where ASF introduced evidence that the relationship with Air Asia



was a ruse in order to allow the CIA proprietary to qualify for a tax exemption while maintaining its cover, Defendants contended that the exact same set of facts was nothing more than an ordinary arms-length commercial arrangement. That Respondents' version differed so markedly from ASF's evidence proves how the jury's verdicts must have rested on its credibility choices. The trial essentially came down to a swearing contest, and the jury believed ASF. Since *Lind*, the cases have consistently held that when credibility factors predominate, the trial judge should defer to the jury's credibility choices. The Ninth Circuit's decision runs directly counter to that precedent.

Respondents have attempted to refute ASF's authority by arguing that each decision is distinguishable on its facts. However, an analysis of the cases shows that they are all on point. Each of these cases stands for the principle that when the verdict hinges on the credibility of witnesses, it is an abuse of discretion for the trial court to substitute its judgment for that of the jury. Thus, although a trial judge does have a measure of discretion in ordering a new trial based on insufficiency of the evidence, it is impermissible to reject the jury's credibility choices.

To be sure, there are general statements that a trial judge may "assess the credibility of witnesses" in deciding whether to order a new trial based on insufficiency of the evidence. However, no case has sanctioned a complete rejection of the verdict winner's witnesses in balancing whether the verdict is "against the great weight of the evidence." In other words, a trial judge may not reject the testimony of all of the verdict winner's witnesses, and then conclude that the verdict is now against the great weight of the evidence.

A trial judge's discretion is circumscribed because if a trial court could reject a jury's credibility choices by simply stating that it did not believe a party's witnesses, the trial judge's discretion would in fact be unlimited. Since a Court of Appeals cannot assess credibility from the cold record, it cannot properly circumscribe the trial judge's discretion if the trial judge substitutes judgment on issues of credibility. Therefore, the Seventh Amendment requires that the trial judge defer to the jury's credibility choices in cases that hinge on credibility.

This Court should establish a uniform rule prohibiting a trial judge from ordering a new trial in cases where the verdict hinged primarily on the jury's decision of which witnesses to believe and which witnesses to disbelieve. Such a rule would be consistent with the line of cases stemming from *Lind*. Contrary to Respondents' argument, those decisions are not limited to the facts of the particular case only. All of those decisions stand for the principle that ASF urges this Court to adopt.

In *Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979), the Court stated that "there was testimony to support the jurors' decision that an oral contract existed between Vander Zee and Karabatsos. The trial court's contrary view of the credibility of witnesses does not justify the granting of a new trial." In *Fondren v. Allstate Ins. Co.*, 790 F.2d 1533, 1536 (11th Cir. 1986), the Court held that "credibility is a determination to be made by the jury, not the district judge. . . ." In *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1373 (11th Cir. 1982), the Court stated that "[a]lthough others might have accorded little or no weight to Jackson's testimony under such circumstances, this jury found it to be credible. That is a jury's function." And, in *Williams v. City of Valdosta*, 689 F.2d 964, 973, n.7 (11th Cir.

1982), the Court squarely held that "the trial judge should not substitute his own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury."

The Ninth Circuit's decision is clearly contrary to the weight of authority and in violation of the Seventh Amendment. Therefore, all the requirements for certiorari are present and ASF's petition should be granted.

### III.

#### **RESPONDENTS' PROCEDURAL ARGUMENTS ARE UNMERITORIOUS AND DO NOT PRECLUDE CERTIORARI**

Respondents argue that even if the Ninth Circuit committed error by affirming the District Court's substitution of judgment on credibility questions, certiorari is still not warranted.

First, Respondents contend that the verdicts on the bad faith denial of contract and attorneys' fees claims cannot be reinstated because the Ninth Circuit concluded that it did not have jurisdiction to review the new trial order on the basic breach of contract claim. This argument ignores the opinion of the Court of Appeals on the exact same issue. Although the Ninth Circuit concluded that it would not presently review the new trial order on the basic breach of contract claim, it also held that it had jurisdiction to review the conditional new trial orders on the other two verdicts in favor of ASF. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176, 190, n.15 (9th Cir. 1989).

In short, the Court of Appeals rejected the same argument that Respondents are making here. Accordingly,

had the Court of Appeals not erroneously concluded that the trial judge was free to reject the jury's credibility choices, it would have been able to reinstate the verdicts despite its holding that it was without jurisdiction to review the new trial order on the basic breach of contract claim. In an attempt to forestall Supreme Court review, Respondents are mixing up the Court of Appeals' jurisdictional holding on the basic breach of contract claim with its jurisdictional holding on the other two verdicts.

If this Court were to reverse the Ninth Circuit's affirmation of the conditional new trial orders, reversal of the new trial order on the basic breach of contract claim would naturally be required once that claim became ripe for review because that order was also premised on the exact same credibility findings by the trial judge about the formation and continuous existence of the 1956 oral agreement. (See Appendix C).

Therefore, Respondents' argument that reversal is impermissible because there is no judgment in favor of ASF on the basic breach of contract claim is specious. There is no legal or logical impediment to this Court reversing the Ninth Circuit's conditional new trial orders. Reversal of the conditional new trial orders necessarily means that the prerequisite of a valid and existing contract is present. The cases cited by Respondents are thus easily distinguishable. In *Valente-Kritzer v. Pinckney*, 881 F.2d 772, 775 (9th Cir. 1989), there could be no bad faith denial of contract because the Court held as a matter of law that there was no contract. And, in *Kruse v. Bank of America*, 202 Cal.App.3d 38, 58-59, 248 Cal.Rptr. 217 (1988), the California Court of Appeal concluded that without question there was no underlying contract between the parties. Therefore, the Court rejected out of hand any tort liability.

Finally, Respondents argue that reinstatement of the verdict is impermissible considering the District Court's alternative grounds for the conditional new trial orders based on allegedly "excessive damages." However, the Court of Appeals never reached that issue basing its affirmance solely on the "insufficiency of evidence" ground. See *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, *supra*, 880 F.2d at 189-190. The D.C. Circuit faced the same issue in *Vander Zee v. Karabatsos*, *supra*, 589 F.2d at 729. The simple solution was to remand the case for an opportunity to consider the additional ground after reversing the District Court on the "insufficiency of evidence" ground. Here, since the District Court bifurcated the liability and damages phases, this Court should reinstate the liability verdicts. The case could then be remanded to the Ninth Circuit for consideration of the "excessive damages" ground on the bad faith denial of contract claim.<sup>1</sup>

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<sup>1</sup> Although the District Court's treatment of this issue was not without ambiguity, it is apparent that the "excessive damages" ground only pertained to the bad faith denial claim and not to the basic breach of contract claim or attorneys' fees claim. (See Appendices C and E).

IV.

CONCLUSION

The Ninth Circuit's affirmance of the District Court's conditional new trial orders is contrary to established precedent. Nothing in Respondent's brief counters ASF's argument that the conditional new trial orders resulted in a violation of its constitutional right to a jury trial. Accordingly, ASF's petition should be granted.

DATED: January 9, 1990.

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